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Supreme Court, U.S.
FILED
JUL 29 2002
OFFICE OF THE CLERK

No. 01-1879

In the Supreme Court of the United States

GUN OWNERS' ACTION LEAGUE, INC.; OUTDOOR MESSAGE COOPERATIVE, INC.; MASSACHUSETTS SPORTSMEN JUNIOR CONSERVATION CAMP, INC., *et al.*,

Petitioners

v.

JANE SWIFT, Acting Governor, Commonwealth of Massachusetts, *et al.*,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

EDWARD F. GEORGE, JR.
Edward F. George, Jr.
& Associates
110 Florence St., 2nd Floor
P.O. Box 393
Malden, MA 02148

STEPHEN P. HALBROOK*
Counsel of Record
10560 Main Street
Suite 404
Fairfax, Virginia 22030
(703) 352-7276

Attorneys for Petitioners

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ARGUMENT

The First Circuit has invented a new exception to the right to free speech and press: persons may not shoot at targets with human images because such defacement encourages gun violence. The court does not appeal to any of the rationales in this Court's First Amendment jurisprudence. It does not suggest the applicability of the test set forth in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), which held that the First Amendment does not permit the state "to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

Brandenburg and its progeny would seem to be the only applicable set of precedents, but their application here would be a Great Leap Forward from the rule as it now stands. Shooting at a picture of a human image, whether the picture depicts Osama bin Laden or is a caricature of a criminal, does not constitute advocacy of a violation of law, is not directed to inciting imminent lawless action, and is not likely to incite such action. Indeed, such defacement is often an expression of patriotism.

Governor Swift[1] argues that this case presents no important question of federal law requiring resolution by this Court, but only the application of settled rules of law to the facts here. State Respondents' Brief in Opposition (hereafter "Br.") at 8. To the contrary, the law at issue is a wholly new

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[1] "Swift" refers to Acting Governor Jane Swift and the other respondents.

form of censorship which this Court has never directly addressed. Further, the First Circuit's decision introduces a completely novel and unprecedented argument never before heard in First Amendment jurisprudence: that the defacement of a picture of a human -- in this case, by shooting at such picture as a target -- may be censored to prevent "gun fatalities." Br. 12 n.8. This pushes the envelop far beyond the standard as most recently articulated in *Ashcroft v. Free Speech Coalition*, 152 L. Ed. 2d 403, 122 S. Ct. 1389, 1399 (2002), as follows: "The prospect of crime, however, by itself does not justify laws suppressing protected speech."

In exchange for being subject to the censorship, the Act essentially offers immunity for what would otherwise be a serious felony. The Act imposes 2½ to 10 years imprisonment for mere possession of a "large capacity" weapon or feeding device.[2] While a person with a Class A or Class B license is exempt from this prohibition, such licenses are discretionary with the police.[3] However, a club may obtain a Class A license, and a non-licensee may possess a large capacity weapon at such club.

That is where the First Amendment violation arises:

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[2] Massachusetts General Laws ("M.G.L."), § 121 of Ch. 140, § 10(m) of Ch. 269. This part of the enactment belies Swift's denial that the Act "radically criminalized previously-lawful conduct." Br. 6, citing Petition at 4.

[3] As Swift recognizes, "even if no express disqualification applies, the licensing authorities may nonetheless refuse to issue a Class A or Class B license upon a finding that the applicant is not a 'suitable person' or that the applicant does not have a legitimate need for the license." Br. 7, citing M.G.L. c. 140, § 131(d)(vi), (vii).

"Such club shall not permit shooting at targets that depict human figures, human effigies, human silhouettes or any human images thereof . . . ." M.G.L., Ch. 140, § 131(a) (¶ 2, last sentence). This restricts such shooting with any kind of gun whatever.[4]

Despite this being apparently the first such censorship of its type in world history, Swift argues that there is nothing here for this Court to decide. The First Circuit stated that "[n]o court has recognized target shooting as a constitutionally protected form of expression." Br. 10, citing Pet. App. 24a-25a. One would think that, where freedom of expression is concerned, the relevant point would be that no court has (until now) denied that shooting at a target of, say, Adolf Hitler is constitutionally protected.[5]

The First Circuit assumed without deciding that shooting at targets with human images "is expressive conduct entitled to some degree of First Amendment protection," but found that protection to be overridden by the state interest in

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[4] Swift consistently misstates the statute as prohibiting "shooting a high capacity weapon at a target with a human figure or effigy, in Class A-licensed gun clubs." *E.g.*, Br. 3. The above statutory language prohibits shooting at a target with a human image with *any* type of gun, even a BB gun.

[5] It is not as if petitioners' Hitler target was the first of its kind, as such targets were part of the popular culture as political expression during World War II. For instance, the 1944 Universal Pictures film *Spider Woman* included "a moving life-sized cutout of Hitler being used as a shooting gallery target." Chris Steinbrunner *et al.*, *The Films of Sherlock Holmes* (Citadel Press, 1978), 124. The target was a frowning caricature of Hitler punctured with bullet holes. *Id.* at 120 (illustration).

preventing "gun fatalities." *Id.* at 10-11. But Swift begs the question when she argues that the opinion does not conflict with relevant decisions of this Court. Br. 10. Neither the First Circuit nor Swift suggests that the censorship here is somehow a logical extension of the *Brandenburg* rule or some other rule.

Swift insists that the First Circuit correctly stated and applied this Court's jurisprudence concerning content neutrality, but this Court has never even hinted that censorship would be justified by the reasons suggested by the First Circuit:

> There is an obvious connection between the Commonwealth's interest in preventing gun fatalities and its decision to restrict the shooting practices of certain gun clubs. A person who has practiced shooting at a human-shaped target will likely be more proficient at shooting humans than a person who has had to practice at a circular target.

Br. 10-11, quoting Pet. App. at 24a. This Court's formulation in *Brandenberg* and its progeny is completely left out of the analysis.

Nor has this Court ever sanctioned censorship because it "applies to both 'supporters of tyrants . . . and advocates of freedom.'" Br. 11, quoting Pet. App. 25a. This is supposedly content neutral because no particular viewpoint is advanced or impeded, and only "a particular mode of potentially expressive conduct . . . at a particular place" is prohibited. Br. 11, citing 25a-26a. This is like arguing that censorship is justified and is content neutral if it bans speech by Republicans and Democrats

alike, and if it bans only "a particular mode of potentially expressive conduct" (say defacing a copy of the opposition party's platform) "at a particular place" (like a state-licensed club of some kind). This Court's precedents concerning content neutrality have never been extended in this fashion to ban expression of a given type under the guise that the censorship extends to persons with political views on both sides of the fence.

Swift next argues that the First Circuit properly applied intermediate scrutiny[6] and that the Act satisfies this standard because "preventing those unlicensed to use large capacity weapons from becoming proficient at shooting humans is a significant governmental interest . . . ." But the Act makes no such declaration of intent, and "we have never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000). Moreover, *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 122 S. Ct. 2080, 2002 U.S. LEXIS 4422, *36-37 (2002) (Breyer, J., concurring, joined by Souter and Ginsburg, JJ.), explains:

> In the intermediate scrutiny context, the Court ordinarily does not supply reasons the legislative body has not given. *Cf. United States*

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[6] Although the censorship here does not pass intermediate scrutiny, this case involves political expression to which the strict scrutiny standard applies. Swift has the burden to prove that the ban "is (1) narrowly tailored, to serve (2) a compelling state interest," and thus must demonstrate that it does not "unnecessarily circumscribe protected expression." *Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2002 U.S. LEXIS 4883, *17 (2002). Swift has not even attempted to do so.

> *v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 . . . (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions") . . . . It does mean that we expect a government to give its real reasons for passing an ordinance. . . . I can only conclude that if the village of Stratton thought preventing burglaries and violent crimes was an important justification for this ordinance, it would have said so.

Swift further asserts: "The First Circuit's conclusion that there is an obvious connection between preventing gun fatalities and prohibiting shooting at targets with human images with large capacity weapons has a sound empirical basis." Br. 12 n.8. The only evidence for this "sound empirical basis" is a citation to four cases in which persons convicted of unlawful homicides had possessed or practiced with human silhouette targets.[7] This is like saying that if an arsonist ever burned an American flag, flag burning could be banned because there is "a sound empirical basis" that it leads to arson. *Ashcroft v. Free Speech Coalition*, 122 S. Ct. at 1403, rejected a similar argument as follows:

> The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in

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[7] One such case, *Commonwealth v. Hughes*, 536 Pa. 355, 365, 639 A.2d 763, 768 (1994), states only that the defendant obtained such targets, and further notes that he committed murder at point blank range, where target skills were irrelevant.

> illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.

After making this grim argument about how shooting at paper targets with human images leads to murder, Swift shifts gears and argues that the censorship is not significant because "alternative channels of communication are available," including "shooting at images at any place where target shooting is lawful other than gun clubs with a Class A license." Br. 12, citing Pet. App. 27a-28a. If censoring targets was really significant in reducing homicides, the legislature would have enacted a state-wide prohibition applicable at all shooting ranges, licensed and unlicensed. In *Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2002 U.S. LEXIS 4883, *26-27, this Court found the purported purpose of the free speech restriction in that case to be

> so woefully underinclusive as to render belief in that purpose a challenge to the credulous. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994) (noting that underinclusiveness "diminishes the credibility of the government's rationale for restricting speech"); *Florida Star v. B.J.F.*, 491 U.S. 524, 541-542 (1989) (Scalia, J., concurring in judgment) ("[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest

unprohibited" . . .).[8]

Since the Act prohibits all persons from shooting at pictures of humans at licensed ranges but exempts "public safety personnel performing in line with their official duties," M.G.L. § 131(a) (¶ 2, last sentence), the political content of this State-imposed message is that private citizens, but not the police, should be pacifists. Swift responds that "the Act conveys no 'message,' political or otherwise. Moreover, State law enforcement personnel are not exempt from the licensing requirements of Chapter 140." Yet these denials cannot obliterate the Act's inherent pacifist message: citizens should not think or even fantasize about shooting a human, whether Hitler, bin Laden, or an attacking criminal, but the police should have such thoughts and should hone their skills in shooting dangerous suspects.

Since pacifists reject the use of force in all circumstances, they may have a negative attitude toward shooting at targets with human images. In *Polsky v. Wetherill*, 455 F.2d 960, 961 (10th Cir. 1972), a conscientious objector described his views as follows: "In basic training I became aware of the metamorphosis that lead me to my present position. In the evenings, after training, I began thinking about the human silhouettes we fired at during range week . . . and finally the realization that I could not possibly continue, in good concious [*sic*], to participate in an army."

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[8] The specific restriction in that case "fails strict scrutiny because it is woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms." *Id.* at *32.

In appealing to the alleged purpose of discouraging "gun fatalities," the First Circuit has not articulated any of the exceptions to the First Amendment which exist in this Court's jurisprudence. *Republican Party of Minn.*, 2002 U.S. LEXIS at *47-48 (Kennedy, J., concurring), explains about such cases:

> [C]ontent-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests. . . . "Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld." (Citation omitted.)

The free speech claim in this case is an important question of federal law which has not been, but should be, settled by this Court. Swift argues that the issue here "is one of significance in Massachusetts alone and apparently nowhere else in the United States," since no other state has such a law. Br. 14. This ignores that "Massachusetts alone" consists of nearly six and a half million people, all of whom have First Amendment rights. There are far more gun owners in the Commonwealth who would like to shoot at a target of Osama bin Laden than there are persons who burn the American flag.

Moreover, this Court has been solicitous of protecting First Amendment rights from new and unique threats.[9] *Wooley v. Maynard*, 430 U.S. 705 (1977), invalidated a law that existed in only one state that required drivers to post a political message on their automobile license plates. The law posed a novel threat to free speech: whether a state may "require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Id.* at 713. That message – "Live Free or Die" – was at the opposite end of the ideological spectrum from Massachusetts' pacifist message here. As the plaintiff in that case stated in part, "I also disagree with the motto on political grounds. I believe that life is more precious than freedom." *Id.* at 708. This Court held that he could not be required to display that message.

Similarly, this Court should decide whether the unprecedented censorship in this case and the unprecedented justification therefor are consistent with the First Amendment rights to free speech and press.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit.

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[9] *See Watchtower Bible & Tract Society of New York*, 122 S. Ct. 2080, 2002 U.S. LEXIS 4422, *13 ("Those cases involved petty offenses that raised constitutional questions of the most serious magnitude -- questions that implicated the free exercise of religion, the freedom of speech, and the freedom of the press.").

Respectfully submitted,

STEPHEN P. HALBROOK*
10560 Main Street, Suite 404
Fairfax, Virginia 22030
(703) 352-7276
Attorney for Petitioners
*Counsel of Record

Edward F. George, Jr.
Edward F. George, Jr. & Associates
110 Florence St., 2nd Floor
P.O. Box 393
Malden, MA 02148
Attorney for Petitioners